UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD

ROCKWELL MINING LLC

and **Case No. 09-CA-206434**

UNITED MINE WORKERS OF AMERICA,
INTERNATIONAL UNION, AFL-CIO

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE PAUL BOGAS

I.

INTRODUCTION AND STATEMENT OF THE CAST

This case involves the discharge of lead in-house Union organizer, Jerry Hager for the substandard performance of a job for which the Respondent failed to properly train him as required by federal law.

Although resolving all critical credibility determination in favor of Hager and against Respondents, the ALJ failed to find the reasons advanced for Hager's firing as pretextual.

As set forth in our Exceptions in order to avoid burdening the record with redundancy, the UMWA agrees with and fully adopts and incorporates Counsel for the General Counsel's ("CGC") Exceptions and supporting brief. We do, however, wish to emphasize that, by deliberately failing to properly task train Hager before reassigning him to a new job, the Respondent purposely created a situation in which Hager was destined to fail.

1. Respondent failed to properly train Hager as required by federal law before assigning him to a job with which he was not capable.

a. Federal law required Respondent to task train Hager.

Pursuant to 30 U.S.C. §§ 811 and 825, the Department of Labor has promulgated several standards requiring operators to "task train" employees on new work assignments. The standard for underground mines is found at 30 C.F.R. § 48.7 and requires operators to provide training to miners assigned to certain tasks for the first time. 30 C.F.R. § 48.7(a). The list of tasks includes operation of mobile equipment. *Id.* A newly assigned task cannot be performed until the training is completed. 30 C.F.R. § 48.7(a). *See also Pyramid Mining, Inc.*., 15 FMSHRC 519, 522 (Mar. 1993) (ALJ Weisberger). A "task" for the purpose of this standard is defined as "a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge." 30 C.F.R. § 48.2(f). The training must be given in an on-the-job environment and include instruction on the health and safety aspects and the safe operating procedures related to the assigned task. 30 C.F.R. §48.7(a) (1). Training must include supervised practice or supervised operation. 30 C.F.R. § 48.7(a)(2). All training and supervised performance should be given by a qualified trainer or someone experienced in the assigned task. 30 C.F.R. § 48.7(e). Miners should also receive new training on safe operating procedures if a machine or equipment is modified. 30 C.F.R. § 48.7(a)(3). The standard for surface mines and surface areas of underground mines is found at 30 C.F.R. § 48.27, and is substantially similar to the underground standard. *See Cannelton Industries, Inc..*, 24 FMSHRC 840, 855-56 (Aug. 2002) (ALJ Barbour). Once a miner is task trained, the Employer is required to certify on MSHA Form 5000-23 that the

miner received the required training. This form must be maintained by the Employer for two years and be made available to MSHA for inspection. 30 CFR §46.9(g), (h); 30 CFR §48.29(a), (c).

In this case, Jerry Hager, the Union's lead in-house organizer, was, at the height of the Union campaign at the Respondent's surface mine, reassigned to operate a rock truck which is a large "oversized dump truck…which can carry loads of up to 150 or 200 tons" instead of the usual equipment (bulldozers and excavators) he normally operated. (ALJ. Dec. p. 3, l. 30-35) At trial the parties disputed whether the Respondent had provided Hager with he required task training before switching his job assignment. (ALJ Dec. p. 4 fn. 5) However, <u>all</u> credibility determinations on this critical point were resolved against Respondent and in favor of Hager. (ALJ. Dec. pp 5-6, fn. 7; pp 9-10) In fact, the ALJ also determined that the Respondent had actually falsified the task required training reporting forms! (ALJ Dec. p. 10, lines 1-10)

The bottom line here is that if Respondent had task trained Jerry Hager before reassigning him to an unfamiliar job, it is highly likely that Hager would not have had the accident which Respondent seized upon to justify his discharge.

b. <u>Respondent placed Hager in a situation in which was designed for disaster and failure</u>.

As noted above, Respondent was required by federal law to task train Hager **before** transferring and reassigning him to a new job. They didn't. Consequently, Hager was involved in an accident upon which Respondent then seized in order to discharge Hager. Interestingly, at the time of this accident, as conceded at trial, Respondent apparently had doubts about, "whether he could capably operate the rock truck." (ALJ Dec. p. 10, line 39). That the use of the accident as justification for Hager's discharge is pretextual is further evidenced by Respondent's own

documents. Indeed, the notes of Respondent's HR Director, Colin Milam establish that the Company should have considered the lack of training as a mitigating factor in considering any discharge, (G.C. e.g., 3 & 4). Significantly, the Company failed to apply this policy to Hager's case.

In situations involving an Employer's deliberate creation of a situation which places a Union activist on a track for failure and discharge, the Board has found a violation of the Act -- particularly when the Employer fails to train the employees before assigning them a new task. See, *Baron Honda-Pontiac,* 316 NLRB 611 at 620-621 (1995) (Board found violation where, "It was Respondent's own actions that denied the men the training that they conceded required and it was Respondent's own actions that ensured they would be given tasks beyond their capabilities.") In that case, the Board found the Employer's reasons for the dischargees pretextual in light of the fact that the Employer failed to provide any training to the dischargees prior to assigning them a task at which they failed. *See also, Schott's Bakery*, 164 NLRB No. 59 (1967). In that case, a Union activist was transferred to a job beyond his capabilities. His lack of training and experience lead to an incident in which Company property was damaged. He was discharged for this accident. By creating this situation, the Board determined that the Company had discriminatorily discharged the employee.

In this case, Respondent was required by federal law to task train Jerry Hager before reassigning him to operate equipment with which he was not qualified. They didn't; and not surprisingly, an accident ensued. Since Respondent affirmatively created this situation which led to Hager's accident, Respondent's purported reasons for Hager's resultant discharge because of this accident are pretextual. By failing to recognize this the ALJ erred.

CONCLUSION

For all the reasons urged by CGC and the above-points, the Charging Party respectfully urges that the Exceptions to Judge Bogas' June 4, 2018, Decision be granted.

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, AFL-CIO

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CERTIFICATE OF SERVICE

I, Brian Lacy, hereby certify that I have served the attached **CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE PAUL BOGAS** on the other parties by sending a true copy thereof via electronic mail and regular U.S. mail on the 1st day of August 2018, to the following:

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